59

Supreme Court, U.S.
FILED
(1)
07-6 JUN 25 2007
OFFICE OF THE CLERK

No. 07-

IN THE

Supreme Court of the United States

FEDERICO GIOVANELLI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

VIVIAN SHEVITZ
(*Counsel of Record*)
ATTORNEY AT LAW
46 TRUESDALE LAKE DRIVE
SOUTH SALEM, NEW YORK 10590
(914) 763-2122

Attorney for Petitioner

QUESTION PRESENTED

The "catch-all" federal obstruction of justice statute, 18 U.S.C. § 1503, punishes a defendant who "corruptly endeavors" to obstruct the "due administration of justice". In United States v. Aguilar, 515 U.S. 593 (1995), the Court held that the term "endeavor" requires a nexus with *a* judicial proceeding, as opposed to embracing an "endeavor" that "might" result in "obstruction" of some later proceeding (or might not).

The Court of Appeals upheld Petitioner's convictions under § 1503 on the basis that his "corrupt endeavor" to obstruct justice consisted of his "passing along [`information from the grand jury proceedings'] to the targets of the investigation" about their imminent arrest and about charges anticipated in the indictment, knowing that they "might" do something obstructive.

The question presented here is whether a the term "corrupt endeavor" in 18 U.S.C. § 1503 reaches conduct consisting solely of "passing along" and uttering "grand jury information" to targets with knowledge that someone might commit some – *any* -- obstructive activity (or might not).

PARTIES TO THE PROCEEDING BELOW

Petitioner is Federico Giovanelli, defendant-appellant below.

Respondent is the United States of America, appellee below.

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

PARTIES TO THE PROCEEDING BELOW ii

PETITION FOR A WRIT OF CERTIORARI 1

OPINIONS BELOW 1

JURISDICTION 1

RELEVANT STATUTES 1

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 13

I. THE SECOND CIRCUIT'S DECISION DEFINING "CORRUPT ENDEAVOR" TO MEAN FORESEEABILITY OF POSSIBLE OBSTRUCTION STANDS IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT, WHICH LIMIT THE REACH OF THE "VERY BROAD" STATUTE TO REACH ONLY CORRUPT CONDUCT WITH A NEXUS TO A JUDICIAL PROCEEDING 14

II. THE CATCHALL OBSTRUCTION OF JUSTICE STATUTE DOES NOT GIVE FAIR NOTICE THAT PASSING INFORMATION WITH KNOWLEDGE THAT A TARGET MIGHT COMMIT OBSTRUCTIVE CONDUCT, THE NATURE OF WHICH WILL BE DISCLOSED AFTER INDICTMENT, WILL BE PUNISHED AS A "CORRUPT ENDEAVOR" TO OBSTRUCT THE DUE ADMINISTRATION OF JUSTICE 23

TABLE OF CONTENTS
(continued)

Page

III. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO CLARIFY THE MEANING OF "CORRUPT" AND "ENDEAVOR" IN THE CATCHALL PROVISION OF THE OBSTRUCTION OF JUSTICE STATUTE 28

CONCLUSION 30

APPENDIX TABLE OF CONTENTS

Appendix A: Relevant Statutory Provisions A-1

Appendix B: Second Circuit Decision A-9

Appendix C: Second Circuit Order Denying Petition for Rehearing A-23

Appendix D: Excerpt Of Jury Charge A-24

TABLE OF AUTHORITIES

CASES

Arthur Andersen LLP v. United States, 544 U.S. 696 (2005) 17, 18, 20

McBoyle v. United States, 283 U.S. 25, 27 (1931) 24

Pettibone v. United States, 148 U.S. 197, 207 (1893) 15

Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) 22

United States v. Aguilar, 515 U.S. 593 (1995) ..... passim

United States v. Brenson, 104 F.3d 1267 (11th Cir.) , cert. denied, 118 S. Ct. 214 (1997) 23

United States v. Giovanelli, 945 F.2d 479 (2d Cir. 1991) 4

United States v. Hariss, 347 U.S. 612 (1954) 24

United States v. Rosner, 485 F.2d 1213, 1228 (2d Cir. 1973) 12, 24

United States v. Russell, 255 U.S. 138, 143 (1921) 16, 27

United States v. Smith, 817 F.2d 24 (6th Cir. 1987) 23

STATUTES

18 U.S.C. § 3 22

18 U.S.C. § 641 23

18 U.S.C. § 1503 ..... passim

18 U.S.C. § 1512(b) 17

28 U.S.C. § 1254(1) 1

TABLE OF AUTHORITIES

Rules

Rule 6 of the Federal Rules of Criminal Procedure 1, 2, 8, 21, 23

Rule 6(e)(2)(B) 21

SENTENCING GUIDELINES

U.S.S.G. § 2J1.1(c)(1) 25

U.S.S.G. § 2J1.2 5

U.S.S.G. § 2X3.1 25

OTHER AUTHORITIES

Merits Brief of Respondent, Arthur Andersen LLP v. United States, 544 U.S. 696, 698 (2005) 18

Gangland News 21

http://www.ganglandnews.com/column 240.htm 8

http://www.ganglandnews.com/column239.ht m 7

PETITION FOR A WRIT OF CERTIORARI

Petitioner Federico Giovanelli respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

OPINIONS BELOW

The Second Circuit's decision is reported at 464 F.3d 346 (2d Cir. 2006), and is reprinted in Appendix B to this Petition, A-9 – A-22. The Order denying Rehearing is reprinted at Appendix C (A-23).

JURISDICTION

The court of appeals issued its decision on September 27, 2006, App. 1a, and denied a petition for rehearing and rehearing en banc on March 28, 2007 (Appendix C, A-23). This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT STATUTES

The "catch-all", or "omnibus clause" of the federal obstruction of justice statute, 18 U.S.C. § 1503 (Appendix A, A-1), imposes a fine of $5000 and/or imprisonment for not more than five years on a person who

> corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice.

Rule 6 of the Federal Rules of Criminal Procedure (Appendix A, A-2-4) provides, in paragraph (e) (2):

> (2) Secrecy.
>
> (A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e) (3) (A) (ii) or (iii).

STATEMENT OF THE CASE

This case implicates the meaning of the broad terms "corruptly ... endeavors" in the "omnibus clause" of the obstruction of justice statute, 18 U.S.C. § 1503. Specifically, it asks whether it is a crime for a person receiving ("tipped") grand jury "information" from an unknown source to "pass" it on to likely defendants.

Petitioner told two "targets" of an almost-concluded grand jury investigation that he had learned from an unidentified person, who purportedly "had" someone with a "connection" with the U.S. Attorney's or FBI office,[1] that the

---

[1] Witness Rotondo testified that Petitioner told him "that he had gotten this information from someone around him, had a girl who was a stenographer or a typist in the Southern District" (Tr.1862); witness DeMatteo, who was present when Rotondo met with Petitioner, testified: "Mr. Rotondo asked Mr. Giovanelli where did you get that and Mr. Giovanelli said I got it from some lawyer, and he gave it to him. It was like a steno pad papers (Tr.2331); he further testified that "Mr. Rotondo asked -- he asked Mr. Giovanelli what should I do and he said, you ought to get a lawyer." (Tr.2331); Palermo testi-

"targets" would imminently be arrested, and that the charges would include several types of offenses including a murder. Information about the investigation had been "on the street" and the "targets" were told about it previously. When Petitioner discussed the "information" with the targets, he told them to get a good defense lawyer.

The government believed, though it was never proven then, that in almost two decades earlier, one time in 1982, Petitioner had had a "corrupt" "mole" who had obtained a federal wiretap application, the disclosure of which had interfered with an investigation of organized crime. This indictment renewed the government's effort to convict Petitioner for his allegedly corrupt, and unproven, contact.

The government never found such "contact". The indictment charged that he corruptly endeavored to obstruct the due administration of justice, specifically, the grand jury from which it believed a "leak" had occurred, and the trial of the indictment it returned.

The indictment against Petitioner did not *charge* that he obtained "information" *from* the grand jury "leak". It did not charge that he corrupted or participated in corrupting anyone with a "role" in the judicial process (*e.g.*, a juror, a witness, a judge) or in the "administration of justice". Nor did the indictment charge any specific obstructive *result* that Petitioner "endeavored" to bring about, or any *means* of obstruction he "endeavored" to accomplish. It charged only that he was in a conspiracy to "obstruct the grand jury" and that one of the

---

fied that Petitioner told him "I have a guy around me and his girlfriend types up reports for the FBI and indictments at the office", and specified that he had said at "the FBI office;" Palermo thought that he had meant the FBI office in Queens and "didn't want to ask any questions after that." (Tr.2407 quoting prior testimony).

targets undertook to do something obstructive, *i.e.*, set out to murder someone.

1. In 2001, Petitioner Federico ("Fritz") Giovanelli, thought to be a "high ranking member of the Genovese Crime Family", and believed to have had a "leak" in the grand jury on one occasion almost 20 years earlier, was indicted for "passing information" to "targets" of the almost-concluded grand jury investigation into activities of the New Jersey "Decavalcante Crime Family." The indictment against Petitioner (which also contained RICO/ "organized crime" charges of which Petitioner was acquitted) alleged that Petitioner violated § 1503's "omnibus clause," and conspired to do so, solely in that he told others – grand jury targets -- about an impending indictment and that *they* did something.

Specifically, the "to wit" clause of the conspiracy charged that Petitioner met once with Decavalcante higher-up Anthony Rotondo (Count Four) and once with Acting Boss Vincent Palermo (Count Five) and "provided [them] with detailed information about the matters being presented to the Grand Jury and the impending indictment in United States v. Palermo et. al., 99 Cr.1199 (LMM) ... for the purpose of corruptly influencing, obstructing, and impeding those proceedings."

Rotondo, one of those two targets, did nothing obstructive. As Petitioner himself had done when facing charges in the past (*see* United States v. Giovanelli, 945 F.2d 479 (2d Cir. 1991)), Rotondo submitted to arrest and got a lawyer. Ultimately Rotondo "cooperated" and testified against other Decavalcante members, and against Petitioner.

Vincent "Vinny" Palermo acted otherwise: he continued (apparently characteristic) efforts to kill people, including someone he thought was or could be a witness against him in an old murder case (the "Weiss murder"). Some of those he recruited helped him with a plan to murder Scarabino; others – including Rotondo, who said "no", and Capo, who did not

answer the phone when Palermo called – did not. (Those charged with conspiracy to murder were acquitted).

2. The indictment did not particularize any specific or even type of obstructive conduct. It did not particularize any obstructive method, or means, or objective, of the alleged obstruction conspiracy. The sole specification was in the "overt act" section, which alleged that Petitioner had "provided ... information designed to identify a confidential informant ...." The indictment did not charge that Petitioner *had* identified an informant. There was no specification of how his "information" was so "designed".

The "overt act" section specified that the "identification" of an informant occurred in the target's mind. It focused on the conduct of others, to wit: following a November 29, 1999 meeting between Petitioner and Vinny Palermo at Dunkin' Donuts in Queens, "the conspirators" – "based on information provided" by Petitioner – "conspired to murder John Doe #1", whom they believed an informant." (Initial indictment ¶ 3(c)).

Petitioner pressed for particulars because, whatever else may have occurred, he had had nothing to do with any murder plan or conspiracy. By response, prosecutors disclaimed even alleging such a charge, stating that the government was "not alleging that Mr. Giovanelli had any active participation in the conspiracy to murder" (October 2, 2001 letter p.5).

Yet, based on testimony that Petitioner had said that the indictment would contain a charge relating to the murder of a "Jewish guy, ten years ago", Petitioner was sentenced as if he had participated in a conspiracy to kill Scarabino, under the guise of a cross-reference for "obstructing" a murder investigation -- specifically, "the investigation of Fred Weiss' murder." Under the "unenhanced" obstruction Guideline, U.S.S.G. §2J1.2, Petitioner would have faced a range of 15-21 months' imprisonment (level 12). Under a cross-reference provision in that Guideline provision, the sentence was set at

level 30, which carried a range of 121-151 months – almost 10-fold the uncross-referenced range (15-21 months).) (He in fact was first sentenced to 121 months, and on a post-*Booker* remand was sentenced to 96 months).

There was no evidence that Petitioner had had knowledge of, much less participation in, the Fred Weiss murder. Moreover, the suggestion that Petitioner (or someone else) had in fact learned "the information" *from s*omeone who typed indictments was belied by the fact that the Weiss murder was *not* in the indictment returned a few days after the conversation.[2]

Palermo was charged in a *superseding* indictment with the Weiss murder, but the government presented no evidence

---

[2] The only murder predicate charged in the Decavalcante "RICO" indictment was a death-eligible murder of which Palermo alone was charged. After being so charged Palermo "cooperated;" it was then that he told the government that "Fritzy" had said that the charges would include the "murder of a Jewish guy ten years ago."

The death-eligible murder charge was essentially withdrawn by the government.

At a trial of Decavalcante members preceding Petitioner's trial, several defendants were charged with conspiracy to murder someone whom Palermo had thought to be a "rat" who knew that Palermo had committed the Weiss homicide. All were acquitted. Moreover, at that trial Palermo confessed that he had lied when he had told his cohorts that "Fritzy" had fingered Scarabino; he had lied to gain their support in his effort to kill Scarabino.

At Petitioner's trial, the prosecution's position was that Palermo had lied *only* about his story that Petitioner had named a name, not about his story to the government that Petitioner had mentioned the "murder of the Jewish guy".

about whether the charge was returned by the same grand jury, or whether it was a separate "proceeding".

To bridge the void, and establish a *nexus* between the *actus reus* and *mens rea* of passing "information" and a "proceeding" – specifically, *the* grand jury proceeding charged in the indictment -- the government called a detective who testified that at some point he had given *some* testimony concerning the murder of Fred Weiss in the initial grand jury.

The government argued that obstructive intent on Petitioner's part was demonstrated by the fact that Petitioner had asked Palermo whether he was "going to go on the lam." Palermo testified that he had told Petitioner "no," and said that he had a lawyer to get him bail.

When Palermo told Petitioner he had "just a real estate lawyer" Petitioner told Palermo that he could "recommend somebody that's real good. ... So [Fritzy said] he'll get him on the phone for me to set up an appointment." The two walked out to the phone booth and immediately phoned Petitioner's criminal defense lawyer. Palermo set up a meeting, which he then did not attend. (Tr.1159).

3. The government believed that Petitioner had *unlawfully obtained* (purloined) the grand jury information from a *corrupted* "source" or "leak" in the grand jury. (A "Gangland" reporter described this theory in an online article. See http://www.ganglandnews.com/column239.htm).[3] Though

---

[3] Per the August 2, 2001 column, "Feds Bust Fritzi Again":

> Two decades after the feds first suspected Genovese mobster Federico (Fritzi) Giovanelli (right) of having a secret mole in their midst, they nailed him for obstructing justice in a second case.
>
> Giovanelli, long suspected of telling John Gotti's crew about an FBI bug in 1982, was arrested yes-

the government expected to find a "mole" who had violated Grand Jury secrecy rules contained in Rule 6 of the Federal Rules of Criminal Procedure (A-2), no corrupt source of the "leak" was ever found or proven. Indeed, the prosecutor admitted at the conclusion of the trial that it "has never conclusively identified that person and no one has been prosecuted for playing that role in this obstruction of justice" (Tr.2590). Moreover, as was leaked in a Gangland" article, (http://www.ganglandnews.com/column 240.htm) premised on undisclosed FBI documents,[4] Palermo and his cro-

---

> terday and charged with warning New Jersey gangsters that an indictment was about to fall on them two years ago.
>
> Giovanelli, 71, allegedly obtained the names of DeCavalcante mobsters about to be indicted from a stenographer with a company who worked for the Manhattan United States attorney's office in 1999.
>
> Sources said the woman employee came under suspicion early last year after DeCavalcante mobster Anthony Capo began cooperating and told the F.B.I. that Giovanelli had tipped off Capo's acting boss [Palermo] that they were going to be indicted and that one of their members was an informer.

New Jersey mobsters ... have been overheard comparing themselves as models for the Garden State crew led by fictional mob boss Tony Soprano ....

[4] "DeCavalcante mobsters were leery of an FBI undercover operative and plotted to kill him long before a mob mole in the Manhattan U.S. Attorney's office tipped them about an informer in their midst, Gang Land has learned. DeCavalcante turncoats say several incidents raised their suspicions

nies knew of the investigation and planned killing suspected informants before Petitioner spoke with Palermo. Capo, an underling of Palermo, testified that in the summer of 1999, six months before Petitioner's conduct, Palermo reported to Capo that he learned about a big investigation from one Daniels (whose "boss" had something to do with the CIA), who told him that someone was wired and who "possibly had made Palermo concerned about someone he thought might be an informant" (Tr.1662-63). Further, evidence provided by prosecutors under their *Brady* obligation to disclose exculpatory evidence included information that one Gardell, a corrupt Detective, had in fact "leaked" information about the imminence of an indictment in this organized crime investigation to other organized crime members prior to the Decavalcante indictment (Tr.488). Taking the position that Gardell had not "leaked" the information "to Mr. Palermo," the government successfully objected "to any effort to inject with this witness or otherwise the fact that Mr. Gardell ... was indicted and pled guilty in connection with a leak and obstruction of justice." (Tr.1344))

4. Obviously prompted by the absence of evidence of the identity of any corrupt "leak," the prosecutor adopted the theory that it didn't matter how Mr. Giovanelli had acquired information he passed along: "[I]t doesn't matter whether he got that information directly from inside the grand jury room or he found it lying on the floor of the subway." (Government Opening, Tr.36) Criminality, according to the prosecutor, on what Petitioner "intended" when he passed the information along; intent to obstruct justice could be found if Petitioner was aware that the persons with whom he shared the information "might" do something obstructive, such as going on the lam, hiding assets, or killing witnesses –

---

about the associate, Ralph (Ralphie O) Guarino, and the family had "numerous discussions" about whacking him, according to FBI documents obtained by Gang land."

none of which means were charged in the indictment, but which described conduct engaged in by Palermo, or someone else, or some theoretical member of organized crime.

In its brief on appeal (04-5763-cr), the government acknowledged Petitioner's argument that "the law can't criminalize merely passing along information" and further recognized that he still "contest[ed] the theory [of the prosecution] as [h]e ha[d] all along." (Gov.Br. 18).

However, it then wrote (changing its theory) that the "evidence demonstrated `that Mr. Giovanelli didn't just happen upon this information lying around somewhere. He intentionally targeted the Grand Jury,' repeatedly obtaining information `by communicating in some fashion with the person who had access to the secret Grand Jury investigation.'" *Id.* (Gov.Br.19). The government then characterized Petitioner's claim on appeal as the "audacious claim that *repeatedly purloining* secret information from the Grand Jury, with the specific purpose of obstructing" that Grand Jury is simply not a crime.

That was not, of course, Petitioner's claim. He argued that there was no evidence that he had "purloined" secret information.

5. The Second Circuit (Calabresi, Pooler, B.D.Parker) affirmed (*per curiam*) (Appendix B, A-9-23). It held that the government proved a "corrupt endeavor" to obstruct the "due administration of justice" even if Petitioner had not been the "purloiner" nor had conspired or aided the "purloiner." It found a corrupt intent on the ground of what the *hearers* of information might do after hearing the information. But the "nexus" with a "proceeding" was the "obtaining" – or just *knowing* about the obtaining – from the specified grand jury.

It distinguished United States v. Aguilar, 515 U.S. 593 (1995), on the ground that Judge Aguilar had given (false) information to an agent "with no obvious connection to a

particular grand jury," but that here, Petitioner had "passed information directly to the targets of the grand jury" The Court held (464 F.3d 346, 350-351 (footnote omitted) (emphasis added)):

> The trial evidence ...provides ample support for the following facts: (1) that Giovanelli was a long-time "Caporegime" or captain of the Genovese Organized Crime Family of La Cosa Nostra, and that he was part of the Ruling Panel running the Family at the time of his allegedly obstructive acts in 1999; (2) that, at that time, a grand jury in New York was conducting a thorough investigation into another family of La Cosa Nostra, the Decavalcante Family, and that this investigation was going to lead to numerous arrests and indictments; (3) that Giovanelli obtained detailed information from the grand jury proceedings; and (4) that Giovanelli provided to targets of the investigation, including Vincent Palermo, then the Acting Boss of the Decavalcante Family, sensitive information, including (a) two separate written lists of the people to be indicted; (b) the charges on which they were to be indicted; (c) the names of some extortion victims who were being investigated; (d) the fact that a confidential informant was using concealed recording devices to tape-record Palermo; (e) information about the identity of that informant; (f) the fact that the Grand Jury investigation "involved cell phones" that the government was monitoring; (g) the fact that among the charges being considered by the grand jury were murders; and (h) the date on which the forthcoming arrests were to occur.
>
> This evidence clearly supports the charge that Giovanelli's endeavor -- namely, that of pass-

> ing along that information to the targets of the investigation -- had "the natural and probable effect of interfering with the due administration of justice."

Further, the Court held, "the fact that Giovanelli was a high-ranking member of the Genovese Family, and the fact that he passed the information, *inter alia*, to the Acting Boss of the Decavalcante Family, supports the view that Giovanelli knew `that his actions [were] likely to affect the judicial proceeding.' Aguilar, 515 U.S. at 599."

The Court of Appeals added that, though a finding that the defendant "purloined" the grand jury information is "not itself an element of the specific § 1503 offense charged", the evidence "also indicates" that Petitioner "Giovanelli purloined information from the grand jury, *or at least knew* that it had been unlawfully obtained." 464 F.3d at 351 (emphasis added, *citing* with a "*cf.*" prefix, United States v. Rosner, 485 F.2d 1213, 1228 (2d Cir. 1973) (defendant/defense attorney paid off officer posing as corruptible (and corrupted) cop with "contact" in U.S. Attorney's office, to obtain undisclosed "3500 material" from pending criminal prosecution against the defendant; defendant convicted of conspiracy, bribery, and obstruction).

The Court of Appeals also rejected Petitioner's Due Process / vagueness challenge, holding that, though the indictment had not alleged any specific obstructive result or means as to which Petitioner had "endeavored", nonetheless, allegations concerning obstructive acts committed by the cooperating witnesses had appeared in "debriefing reports" and "trial testimony of the same witnesses" in a previous case against other Decavalcante members.

> The Court found it permissible to charge that way: it said that the "indictment was broad and clearly covered all of the particulars that were later presented at trial". On this basis, the Court ruled, "[g]iven the appropriately broad language of the indictment, and the detailed specification of the Government's theory and evidence long before trial, Giovanelli's claim that the Government shifted theories or deprived him of fair notice has no merit." 464 F.3d at 352 (A-16).[5]

REASONS FOR GRANTING THE PETITION

The decision by the Court of Appeals is wrong: no part of the "due administration of justice" is implicated in the "passing" of information by someone without a duty of grand jury secrecy to a "target", even it the "passer" 'knows" that the target "might" do something obstructive. Targets and passers (both "tippees") have no "role" in the "due administration of justice". Section 1503 does not impose duties on those without a role in the "administration of justice", who, therefore, cannot be "corrupted" in those duties.

The Second Circuit's decision expands the statute, is overbroad, and impinges on First Amendment freedoms by criminalizing speech. It is inconsistent with decisions of this Court construing the catchall provision and requiring a close nexus between "endeavor" and a judicial proceeding intended to be corrupted. The decision unconstitutionally and unworkably finds such nexus solely on the basis of the status of the utterer and/or hearer.

---

[5] The Court declined to review the claim that the jury charge (Appendix D, A-24) was prejudicially defective.

I. THE SECOND CIRCUIT'S DECISION DEFINING "CORRUPT ENDEAVOR" TO MEAN FORESEEABILITY OF POSSIBLE OBSTRUCTION STANDS IN CONFLICT WITH RELEVANT DECISIONS OF THIS COURT, WHICH LIMIT THE REACH OF THE "VERY BROAD" STATUTE TO REACH ONLY CORRUPT CONDUCT WITH A NEXUS TO A JUDICIAL PROCEEDING

This Court rejected a broad reading of the "endeavor" clause in the catchall obstruction of justice statute in United States v. Aguilar, 515 U.S. 593 (1995). It held that the term "endeavor" in 18 U.S.C. § 1503 "makes conduct punishable where the defendant *acts* with an *intent* to obstruct justice, *and in a manner* that is likely to obstruct justice". 515 U.S. at 601 (emphasis added). *Both* components – the action and the intended obstructive result -- have a "natural and probable effects" requirement. The *actus reus* contemplates an act performed that has the "natural and probable effect" of actually "interfering" with the due administration of justice, *and* the defendant must know this, *i.e.*, he must know that the "natural and probable effect" of his acts will be the interference with the some specific aspect of the "due administration of justice": "If the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." 515 U.S. at 599 (emphasis added).

Defendant Aguilar was a federal judge who gave false statements to federal agents knowing that a federal grand jury investigation was underway and hoping to avoid responsibility. Justice Rehnquist found the conduct not to have violated 18 U.S.C. § 1503. Thee was no *direct* "nexus" between that conduct and a judicial proceeding; it could not be found that the obstructive conduct had the "natural and probable" effect of interfering with that judicial proceeding.

515 U.S. at 599-600, 601. The agent "might" be a witness in the grand jury, and he might not.

The Court's ruling is that where, as here, any effect on the proceeding is speculative because it depends on what others "might" or "might not" do, the conduct "falls on the other [non-criminal] side of the statutory line."

Aguilar teaches that § 1503 focuses on the defendant's conduct and whether it is directly connected with a specific court or grand jury proceeding, the existence and *knowledge* of which is an absolute requirement of the catch-all provision. "[A] person lacking knowledge of a pending proceeding necessarily lack[s] the evil intent to obstruct." Aguilar, 515 U.S. at 599, *citing* Pettibone v. United States, 148 U.S. 197, 207 (1893).

Though Judge Aguilar knew of the existence of a grand jury proceeding and that the FBI agent was investigating whether he had acted *corruptly* in previous endeavors, and though it was the judge's "impression" that his false statements to the FBI agents would be reported to the grand jury, 515 U.S. at 614, his conduct did not violate §1503 because the direct link between the conduct and the judicial proceeding was missing: the false information *might*, or might *not*, reach that judicial proceeding. It was not the judge's corruption that supplied the element of "corrupt endeavor"; it was whether the *proceeding* would be "corrupted" by false evidence.

In reaching this conclusion, Justice Rehnquist expressly distinguished the case before the Court – where the false statements were uttered to an investigating agent "who might or might not testify before a grand jury" – from a case where someone *delivered* false documents or testimony to the grand jury itself (or to an agent of the grand jury): "Conduct of the latter sort all but assures that the grand jury *will consider* the material in its deliberations. But what use will be made of false testimony given to an investigating agent who has not been subpoenaed or otherwise directed to appear

before the grand jury is far more speculative. We think it cannot be said to have the `natural and probable effect' of interfering with the due administration of justice." *Id.*, at 600 (emphasis added), 601.

The majority rejected Justice Scalia's formulation, which is what the Second Circuit essentially adopted here, that any "act committed *with intent to obstruct* is all that matters," 515 U.S. at 600. Justice Scalia focused on the word "endeavor" -- a term which Justice Scalia found not present in the statute's terms -- and wrote that it "makes criminal not just success in corruptly influencing the due administration of justice, but also the `endeavor' to do so.... The word of the section is `endeavor,' and by using it the section got rid of the technicalities which might be urged as besetting the word `attempt,' and it describes any effort or essay to accomplish the evil purpose that the section was enacted to prevent." *Id.* at 613, *quoting* United States v. Russell, 255 U.S. 138, 143 (1921) (emphasis added) (interpreting substantially identical predecessor statute)."

Justice Scalia wrote: The critical point of knowledge at issue, in my view, is not whether "respondent knew that his false statement would be provided to the grand jury," ..., but rather whether respondent knew--or indeed, even erroneously believed -- that his false statement might be provided to the grand jury (which is all the knowledge needed to support the conclusion that the purpose of his lie was to mislead the jury). ... [Judge Aguilar intended] to impede the due administration of justice, *i.e.*, ... he lied to the FBI agents *intending to interfere with a grand jury investigation into his misdeeds.*" 515 U.S. at 613 (emphasis added in part and in original in part).

Justice Scalia's opinion was not accepted by the majority. Under Aguilar, there needs to be a direct "nexus" between the "endeavor" and the resulting potential impediment to the grand jury investigation. Under Aguilar, just as the defendant-judge's uttering of false words was too attenuated

from the grand jury proceeding to be characterized as an "endeavor" to obstruct the grand jury, because the federal agent to whom he lied might or might not testify before the Grand Jury, Petitioner's knowledge that Palermo "could" go "on the lam" as a result of what he told him, or that he "might" do something that Petitioner himself (and Rotondo) would not (and did not) do in a similar pre-arrest situation, is not enough to turn the attenuated conduct into a "corrupt endeavor". And that "something" that Palermo "might" do "might", or might not, be directly related to a judicial proceeding.

Aguilar's conduct was found to have violated a *different* law, criminalizing the disclosure of wiretap information. There was no requirement in that statute that there be a "judicial proceeding." But his conduct did not violate § 1503.

The Second Circuit's decision is thoroughly inconsistent with Aguilar. Whether Petitioner's conduct may have violated some other law, it was not an endeavor to obstruct the Grand Jury.

The Second Circuit's decision is also inconsistent with this Court's more recent decision in Arthur Andersen LLP v. United States, 544 U.S. 696 (2005), which reversed the conviction of the accounting firm, Enron's auditor, based on its instruction to employees to destroy documents pursuant to its document retention policy.

The opinion focused on the term "corruptly" in 18 U.S.C. § 1512(b), which deals with witnesses (or potential witnesses) in the Administration of Justice. That provision criminalizes "knowingly" "corruptly persuading" an individual not to disclose information to a law enforcement official with intent to hinder an investigation.

The Court "read the inclusion of `corruptly' in § 1512(b) as necessarily implying that an individual can `persuade' another not to disclose information to a law enforcement official with the intent of hindering an investigation

without violating the statute, *i.e.*, without doing so `corruptly.'" It observed: "[T]he act underlying the conviction -- `persuasion' -- is by itself innocuous. Indeed, `persuading' a person `with intent to . . . cause' that person to 'withhold" testimony or documents from a Government proceeding or Government official is not inherently malign." 544 U.S. at 703-04.

As Respondent Arthur Andersen described the government's theory in its merits brief, "all persuasion is `knowingly ... corrupt[]" and is criminal if it is motivated in part by a desire to impede the factfinding ability of a potential future government proceeding -- even if the speaker does nothing more than politely urge the listener to engage in lawful conduct". (Respondent's Merits Brief at 17). Respondent argued that there is "nothing inherently `corrupt' or wrongful about an intent to impede future governmental factfinding within the bounds of the law. Americans regularly engage in a wide range of conduct designed in part to influence or limit the information that reaches government proceedings." This, Arthur Anderson pointed out, was "one of the reasons that our legal system is frequently described as `adversary.'" (Respondent's Merits brief at 17).

Respondent's merits brief discusses the concept of "corruption' as a term in the statute that highlights the differences between Justice Rehnquist's formulation in Aguilar, and that of Justice Scalia. Justice Rehnquist's "nexus" formulation was that if it is not shown that *the proceeding* will naturally and probably be "corrupted" by the defendant's conduct, then there can be no finding of "corrupt endeavor" to obstruct the "due administration of justice". Justice Scalia's formulation is seemingly that the element of "corruption" is found in the act itself: Judge Aguilar *was* corrupt when he gave false information knowing that the agent could infect a grand jury proceeding. *He* wanted to impede and hinder his being brought to justice, and was thus corrupt in his "endeavor."

Thus in Arthur Andersen, Resondent pointed out that the term "corruptly" has two meanings: transitive, that is, corrupting another person, and intransitive, motivated by a purpose that is "corrupt". It argued that "corruptly" should naturally be read, in accordance with parts of § 1512 which set forth *means* of impeding the process (killing, coercing, intimidating or harassing witnesses), to mean *corrupting* in the transitive sense – that is, corrupting a participant (witness) through *dishonest* persuasion tactics, such as bribery.

The intransitive definition, in essence *imputing* a "corrupt *motive*" where the speaker wants (in part) to withhold information, regardless of whether the listener was "corrupted" or corrupted a proceeding, argued Respondent, "produces a line between criminal and non-criminal behavior hat is so arbitrary and absurd that it cannot be what Congress intended." (Respondent's Merits Brief at 18). Respondent argued that that government's understanding of "corruption" goes too far: "A mere intent to impede the fact-finding ability of government proceedings has never been enough to make conduct (let alone truthful speech) criminal in this country". Id. at 21.

The Arthur Andersen Court did not *resolve* the meaning of "corruption" or "corrupt" plainly: it reversed because the jury instructions did not require a finding of "dishonesty". The Court wrote: "The parties vigorously disputed how the jury would be instructed on `corruptly.'" The District Court had proposed to define "corruptly" as "'knowingly and dishonestly, with the specific intent to subvert or undermine the integrity'" of a proceeding." The government had insisted on excluding "dishonestly" and adding the word "impede"; acting with an intent to "impede" would be enough for criminal liability. The District Court had adopted the government's formulation, and "the jury was told to convict if it found petitioner intended to `subvert, undermine, or impede' governmental factfinding by suggesting to its employees that they enforce the document retention policy."

The unanimous Court held these changes "significant"; it rendered the jury charge inadequate to convey the type of "corruption" the statute is aimed at, because "[n]o longer was any type of `dishonesty' necessary to a finding of guilt, and it was enough for petitioner to have simply `impeded' the Government's factfinding ability." That is not enough.

The fact that this Court did not *resolve* the meaning of "corruption" or "corrupt" is a circumstance demonstrating that further clarification is required, and further justifies a grant of *certiorari*.[6] But in any event, for purposes here, the Court's holding that the charge was flawed because it did not require "dishonesty" is key: it suggests that just as "imputing" corruption to the act of destroying documents is not a permissible construction of the word, so too, imputing "cor-

---

[6] Arthur Andersen also discussed, and would have reversed, on what was discussed as a separate consideration of the "nexus" requirement. The Court held that the jury instructions were infirm also because they "led the jury to believe that it did not have to find any nexus between the `persuasion' to destroy documents and any particular proceeding." The Court rejected the government's interpretation of § 1512(e)(1), which states that under that statute, unlike the catchall statute involved here, an official proceeding "need not be pending or about to be instituted at the time of the offense." The Court explained it is "one thing to say that a proceeding `need not be pending or about to be instituted at the time of the offense,' and quite another to say a proceeding need not even be foreseen. A "knowingly . . . corrupt persauder" cannot be someone who persuades others to shred documents under a document retention policy when he does not have in contemplation any particular official proceeding in which those documents might be material. (544 U.S. at 707-08).

ruption" to one whose acts may impede factfinding, and who may *intend* to do so, is not permissible.

"Corruption" conveys some notion of *dishonesty*.

Dishonesty is not found in Petitioner's case. At the beginning the government *expected* to find that Mr. Giovanelli had participated in the dishonest "corruption" of a stenographer who corruptly breached a duty under Rule 6(e) of the Federal Rules of Criminal Procedure to keep grand jury information and proceedings "secret".

The Second Circuit tried but could not conclude that this "element" of theft or dishonesty was proved: it stated that the evidence "indicated" that Giovanelli purloined information from the grand jury" – *or*, the Court wrote, "at least he knew that it had been unlawfully obtained." (A-14). This "purloining" was not in fact legally proved, and the Second Circuit made clear that it is "not itself an element of the specific § 1503 offense charged." (A-14).

There was no other "dishonesty" involved here, and thus nothing on which to find "corrupt intent." As there is nothing "inherently" wrong with enforcing a document retention policy, there is nothing inherently corrupt about passing grand jury information. Drivers who pass police cars regularly "tip off" oncoming drivers, who slow down. The Crime Reporter for *Gangland News* in New York reports grand jury information in his online and printed articles, and he knows, no doubt, that among his audience are organized crime members such as Vincent Palermo. Probably *anyone* who learns that a friend, associate, or business relation is being investigated would pass that information on to the friend.

There is nothing "wrongful" or "corrupt" in so doing.

Nor should it be deemed wrong merely because Mr. Giovanelli "was" (or was thought to be) a "high-ranking member" of "organized crime". He did not violate any obligation of secrecy under Rule 6(c), which imposes obligations of secrecy *only* on persons named in Rule 6(e)(2)(B), and

states that "[n]o obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

He is like any other person who finds information on the subway floor. Even if he "knows" that it was "purloined", that does not make him an "obstructer" of the grand jury without evidence that he was involved in "corrupting" the person who wrongfully and corruptly disclosed it. People who "know" grand jury information are not among those those listed in Rule 6(e) as having obligations to *not* disclose grand jury information. (See Appendix A-3).

Petitioner had a first amendment right to utter information that came into his possession without dishonesty (without *proven* dishonesty) even if it emanated from the grand jury, and even if he uttered it to targets, who *might*, or *might not*, commit obstructive acts at the later trial (or, in the case of the Weiss homicide, which was not charged in the indictment, at some even further remote trial). *See* Smith v. Daily Mail Publishing Co., 443 U.S. 97, 103 (1979) (Government may not generally restrict individuals from disclosing information that lawfully comes into their hands in the absence of a "state interest of the highest order, *quoted in* Aguilar, 515 U.S. at 605 (sustaining conviction for unlawfully disclosing wiretap). If Judge Aguilar's corrupt motive in 'uttering" false statements to an agent was not enough to justify §1503 criminal liability, even with his judicial status and his knowledge of and role in the Administration of Justice, it is difficult to understand how Fritzy Giovanelli *is* responsible.

While the government could have tried to convict Petitioner under some other law, as it convicted Judge Aguilar, *see, e.g.*, 18 U.S.C. § 3 ("whoever, knowing that an offense against the United States has been committed, ... assists the offender in order to hinder or prevent his apprehension") if he had had the intent to hinder apprehension (as opposed to telling Palermo and Rotondo to get lawyers), or, *see*, if he *had* received stolen grand jury minutes, under 18

U.S.C. § 641[7] (conversion of government property) or some other provision, it is not corruption of the administration of justice that Mr. Giovanelli, himself a target of investigations, gives a "heads up" and tells a target that he will be arrested soon.

Whether the issue is framed in terms of the meaning of the term "endeavor", or the term "corrupt", both of which terms have received attention in this Court, this Court's decisions are swept aside by the Second Circuit's overbroad decision. It is not only wrong; it is also unworkable, even if constitutional.

The Second Circuit's decision is inconsistent with this Court's precedents. Those precedents are themselves confusing in their definitions. *Certiorari* should be granted.

II. THE CATCHALL OBSTRUCTION OF JUSTICE STATUTE DOES NOT GIVE FAIR NOTICE THAT PASSING INFORMATION WITH KNOWLEDGE THAT A TARGET MIGHT COMMIT OBSTRUCTIVE CONDUCT, THE NATURE OF WHICH WILL BE DISCLOSED AFTER INDICTMENT, WILL BE PUNISHED AS A "CORRUPT ENDEAVOR" TO OBSTRUCT THE DUE ADMINISTRATION OF JUSTICE

The Constitution requires, by way of Due Process of Law clause, that no one can be punished without "fair warn-

---

[7] Agents who knowingly violate Rule 6(e)(2) have been prosecuted for criminal contempt. *See* United States v. Smith, 817 F.2d 24 (6th Cir. 1987). A sitting grand juror who sought profit from the disclosure of secret grand jury proceedings was prosecuted under § 1503. United States v. Brenson, 104 F.3d 1267 (11th Cir.) (prosecution for conspiracy and obstruction of justice), *cert. denied*, 118 S. Ct. 214 (1997).

ing ... in language that the common world will understand, of what the law intends to do if a certain line is passed." McBoyle v. United States, 283 U.S. 25, 27 (1931). "The constitutional requirement of definiteness is violated by a criminal statute that fails to give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." United States v. Hariss, 347 U.S. 612, 617 (1954). If an otherwise vague statute "can be made constitutionally definite by a reasonable construction of the statute, this Court is under a duty to give the statute that construction." Id. at 618.

Under the government's initial but uncharged theory, there is no doubt that "fair notice" is given that punishment could be imposed under § 1503. "In the beginning" the prosecutors believed that Petitioner had conspired with, or aided or abetted, some "mole" in the United States attorney's office or employed by the grand jury, to act "corruptly" – that is, to violate a duty of secrecy of grand jury material. To be sure, such corruption can be punished as a corrupt endeavor to obstruct justice under § 1503. United States v. Rosner, 485 F.2d 1213, 1228 (2d Cir. 1973), cited by the Second Circuit in this case (A-14). But when that "link" to the "administration of justice" is absent, there is no obstruction of justice under § 1503.

As a substitute for that "original" "corrupt nexus" to a specific (charged) grand jury proceeding – the nexus being a specific stenographer or typist in that grand jury corrupted to disclose information – the government made *the defendant* the one who was "corrupted" or "corrupt". This was premised on his "status" as a "high-ranking member of the Genovese Crime Family". Whether that characterization is (or was) "apt" (after all Petitioner was acquitted of the RICO and RICO conspiracy counts alleging participation in the "Genovese Crime Family"), Petitioner could not thereby foresee whether a "member" would react obstructively, as

some do, or would, like himself and Rotondo, respect the administration of justice and face trial.

Nor did Petitioner have fair notice that his talking with a target (as opposed to anyone else) about the 'information" he learned would be deemed a "corrupt endeavor" to obstruct "the due administration of justice." A *target* of an investigation has no duty to act in the interest of justice, nor has a role in its administration. A target who obstructs justice may be prosecuted under statutes criminalizing specific obstructive misconduct (killing witnesses, tampering, intimidating, etc.) or that he conspires or attempts to commit. A defendant who agrees or conspires with that target to commit such misconduct, or aids and abets such conduct, may be indicted for those criminal acts as well. If convicted, his sentence can be enhanced under the Sentencing Guidelines.

There *is* certainly "fair notice" of such potential charges and punishments: Individuals who allegedly conspired with Vinny Palermo to murder Scarabino were indicted for conspiracy to murder Scarabino. (They were all acquitted). (Judge Aguilar's conviction for disclosing a wiretap application was also upheld, because there was no element of a pending judicial proceeding).

But the statute does not give fair notice that merely talking with Palermo about potential charges in an indictment violates the obstruction of justice statute, nor that in the end, the defendant could be sentenced (as was Petitioner) under a Sentencing Guideline cross-reference punishing him as if he aided and abetted or conspired to commit a murder merely by mentioning its.[8]

---

[8] U.S.S.G. § 2J1.1(c)(1) provides: "If the offense involved obstructing the investigation or prosecution of a criminal offense, apply 2X3.1 (Accessory After the Fact) in respect to that criminal offense." Petitioner's "plain" sentencing range, with his Criminal History Category, would have been 15-21 months. When the cross reference (which "caps" the level at

What if Petitioner had told *only* Rotondo, who did nothing obstructive? Would that constitute obstruction? (Would someone with a lesser "status" in "organized crime" incur criminal responsibility?)

Petitioner did not, and could not have, thought that merely talking to targets would end up costing him 8 years of incarceration. Nor, Petitioner submits, would Justice Scalia, even under his dissenting construction of the statute in Aguilar, because there is no "nexus" *with* the "due administration of justice."

Justice Scalia would have sustained Aguilar's obstruction conviction because he read Pettibone to mean "that the specific intent to obstruct justice could be found where the defendant intentionally committed a wrongful act that had obstruction of justice as its `natural and probable consequence'" – and that no further "nexus" need be found. Justice Scalia faulted the majority for adopting a "`nexus' requirement" that "sounds like" Pettibone "but is in reality quite different. He said that Pettibone stood for the proposition that in interpreting § 1503, assessing the "natural and probable consequence" is one way of establishing intent, and did not stand for the proposition that the statute requires the defendant to intend the "'natural and probable effect"' when intent to obstruct justice is otherwise clear." Aguilar, 515 U.S. at 611. "I think an act committed with intent to obstruct is all that matters." *Id.* at 613.

For all the broadening of the statute that Justice Scalia's position embraces, at bottom Justice Scalia requires some corruption of the due administration of justice. It is "tethered" to that element in the statute, which was designed to protect judicial proceedings from corrupting, intimidating, influences.

---

30 even if "that criminal offense" carries (as does murder) a higher level) was applied, Petitioner's range increased to 121-151 months.

The *premise* of Justice Scalia's formulation is Judge Aguilar's conduct was an "endeavor to obstruct justice" because he gave false statements to a *witness* (or potential witness) in a grand jury proceeding involving his "misdeeds". His misdeed involved corruption of a "player" in the "due administration of justice," one specifically protected in later obstruction statutes that flowed from § 1503.

The Aguilar dissent thus speaks to the defendant's argument that, because "the rest" (that is, the specific provisions) of § 1503 "refers only to actions directed at jurors and court officers, the omnibus clause cannot apply to actions directed at witnesses." 515 U.S. at 614-615. Judge Aguilar also had argued that, "because Congress in 1982 enacted a different statute, 18 U.S.C. § 1512, dealing with witness tampering, and simultaneously removed from § 1503 the provisions it had previously contained specifically addressing efforts to influence or injure witnesses, see Victim and Witness Protection Act of 1982, Pub. L. 97-291, 96 Stat. 1249-1250, 1253, ***his witness-related conduct*** is no longer punishable under the omnibus clause of § 1503."

The inclusion of that understanding, that the conduct was "witness-related", is significant. "Witnesses" are part of the "due administration of justice." Thus, as Justice Scalia noted, the 1982 amendment of the obstruction statutes, adding an express provision aimed at "witnesses", did nothing to alter the omnibus clause, which by its terms encompasses corrupt `endeavors to influence, obstruct, or impede, the due administration of justice.'" Aguilar, 515 U.S. at 615-616 (emphasis added).

"Endeavors" require a "player" in the "due administration of justice."[9] Justice Scalia, Petitioner suggests, would

---

[9] *Accord*, United States v. Russell, 255 U.S. 138, 142-144 (1921) ("endeavor" need not be successful. "Endeavor" includes "preparation [italics counsel's] for an 'endeavor' or

not find that "targets" are part of the "due administration of justice". Nor could Petitioner have fairly thought so, or thought it illegal to talk to people about charges in an anticipated indictment "he found ... lying on the floor of the subway." (Prosecutor's opening, Tr.36).

This Court should grant the Writ and hold that this statute does not give fair notice that information cannot be "passed" to a target without going to jail.

III. THIS CASE PROVIDES AN EXCELLENT VEHICLE TO CLARIFY THE MEANING OF "CORRUPT" AND "ENDEAVOR" IN THE CATCHALL PROVISION OF THE OBSTRUCTION OF JUSTICE STATUTE

This case presents an excellent vehicle for this Court to clarify the meaning of the "endeavor" in the otherwise overexpansive omnibus clause of 18 U.S.C. § 1503. Specifically, the case asks the question whether "passing information to targets" constitutes a "corrupt endeavor to obstruct justice". The Second Circuit held that it is, as long as the defendant "knew" that someone *else* "might" commit an obstructive act which, presumably, might affect some proceeding in the future.

This case turns on the meaning of term "corrupt endeavor." This single question is dispositive.

Further, there are no material factual disputes. There is no real dispute that Petitioner discussed with "targets" of the then almost-terminated grand jury proceeding that they were about to be indicted. Similarly, though the government tried

---

'attempt' to influence the juror"). "The section ... is not directed at success in corrupting a juror but at the `endeavor' to do so. Experimental *approaches to the corruption of a* ***juror*** are the `endeavor' of the section." (emphasis added).

to prove that Giovanelli "stole" the information or obtained it from someone who had a duty to hold it secret, it admitted that it never identified the source of the alleged grand jury "leak."

The meaning of the important statutory terms can and should be addressed in this context.

***

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

VIVIAN SHEVITZ
ATTORNEY AT LAW
46 Truesdale Lake Drive
South Salem, New York
10590
(914) 763-2122

APPENDIX

APPENDIX A

18 U.S.C. § 1503. Influencing or injuring officer or juror generally

(a) Whoever corruptly, or by threats or force, or by any threatening letter or communication, endeavors to influence, intimidate, or impede any grand or petit juror, or officer in or of any court of the United States, or officer who may be serving at any examination or other proceeding before any United States magistrate judge or other committing magistrate, in the discharge of his duty, or injures any such grand or petit juror in his person or property on account of any verdict or indictment assented to by him, or on account of his being or having been such juror, or injures any such officer, magistrate judge, or other committing magistrate in his person or property on account of the performance of his official duties, or corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be punished as provided in subsection (b). If the offense under this section occurs in connection with a trial of a criminal case, and the act in violation of this section involves the threat of physical force or physical force, the maximum term of imprisonment which may be imposed for the offense shall be the higher of that otherwise provided by law or the maximum term that could have been imposed for any offense charged in such case.

(b) The punishment for an offense under this section is--

(1) in the case of a killing, the punishment provided in sections 1111 and 1112 [18 USCS §§ 1111 and 1112];

(2) in the case of an attempted killing, or a case in which the offense was committed against a petit juror and in which a class A or B felony was charged, imprisonment for not more than 20 years, a fine under this title, or both; and

(3) in any other case, imprisonment for not more than 10 years, a fine under this title, or both.

Federal Rules of Criminal Procedure, Rule 6. The Grand Jury

(a) Summoning a Grand Jury.

(1) In General. When the public interest so requires, the court must order that one or more grand juries be summoned. A grand jury must have 16 to 23 members, and the court must order that enough legally qualified persons be summoned to meet this requirement.

(2) Alternate Jurors. When a grand jury is selected, the court may also select alternate jurors. Alternate jurors must have the same qualifications and be selected in the same manner as any other juror. Alternate jurors replace jurors in the same sequence in which the alternates were selected. An alternate juror who replaces a juror is subject to the same challenges, takes the same oath, and has the same authority as the other jurors.

(b) Objection to the Grand Jury or to a Grand Juror.

(1) Challenges. Either the government or a defendant may challenge the grand jury on the ground that it was not lawfully drawn, summoned, or selected, and may challenge an individual juror on the ground that the juror is not legally qualified.

(2) Motion to Dismiss an Indictment. A party may move to dismiss the indictment based on an objection to the grand jury or on an individual juror's lack of legal qualification, unless the court has previously ruled on the same objection under Rule 6(b)(1). The motion to dismiss is governed by 28 U.S.C. § 1867(e). The court must not dismiss the indictment on the ground that a grand juror was not legally qualified if the record shows that at least 12 qualified jurors concurred in the indictment.

(c) Foreperson and Deputy Foreperson. The court will appoint one juror as the foreperson and another as the deputy foreperson. In the foreperson's absence, the deputy foreperson will act as the foreperson. The foreperson may administer oaths

and affirmations and will sign all indictments. The foreperson--or another juror designated by the foreperson--will record the number of jurors concurring in every indictment and will file the record with the clerk, but the record may not be made public unless the court so orders.

(d) Who May Be Present.

(1) While the Grand Jury Is in Session. The following persons may be present while the grand jury is in session: attorneys for the government, the witness being questioned, interpreters when needed, and a court reporter or an operator of a recording device.

(2) During Deliberations and Voting. No person other than the jurors, and any interpreter needed to assist a hearing-impaired or speech-impaired juror, may be present while the grand jury is deliberating or voting.

(e) Recording and Disclosing the Proceedings.

(1) Recording the Proceedings. Except while the grand jury is deliberating or voting, all proceedings must be recorded by a court reporter or by a suitable recording device. But the validity of a prosecution is not affected by the unintentional failure to make a recording. Unless the court orders otherwise, an attorney for the government will retain control of the recording, the reporter's notes, and any transcript prepared from those notes.

(2) Secrecy.

(A) No obligation of secrecy may be imposed on any person except in accordance with Rule 6(e)(2)(B).

(B) Unless these rules provide otherwise, the following persons must not disclose a matter occurring before the grand jury:

(i) a grand juror;

(ii) an interpreter;

(iii) a court reporter;

(iv) an operator of a recording device;

(v) a person who transcribes recorded testimony;

(vi) an attorney for the government; or

(vii) a person to whom disclosure is made under Rule 6(e)(3)(A)(ii) or (iii);

(3) Exceptions.

(A) Disclosure of a grand-jury matter--other than the grand jury's deliberations or any grand juror's vote--may be made to:

(i) an attorney for the government for use in performing that attorney's duty;

(ii) any government personnel--including those of a state, state subdivision, Indian tribe, or foreign government--that an attorney for the government considers necessary to assist in performing that attorney's duty to enforce federal criminal law; or

(iii) a person authorized by 18 U.S.C. § 3322.

(B) A person to whom information is disclosed under Rule 6(e)(3)(A)(ii) may use that information only to assist an attorney for the government in performing that attorney's duty to enforce federal criminal law. An attorney for the government must promptly provide the court that impaneled the grand jury with the names of all persons to whom a disclosure has been made, and must certify that the attorney has advised those persons of their obligation of secrecy under this rule.

(C) An attorney for the government may disclose any grand-jury matter to another federal grand jury.

(D) An attorney for the government may disclose any grand-jury matter involving foreign intelligence, counterintelligence (as defined in 50 U.S.C. § 401(a), or foreign intelligence information (as defined in Rule 6(e)(3)(D)(iii)) to any federal law enforcement, intelligence, protective, immigration, national defense, or national security official to assist the official receiving the information in the performance of that official's duties. An attorney for the government may also disclose any grand-jury matter involving, within the United States or elsewhere, a threat of attack or other grave hostile acts of a foreign power or its agent, a threat of domestic or international sabotage or terrorism, or clandestine intelligence

gathering activities by an intelligence service or network of a foreign power or by its agent, to any appropriate federal, state, state subdivision, Indian tribal, or foreign government official, for the purpose of preventing or responding to such threat or activities.

(i) Any official who receives information under Rule 6(e)(3)(D) may use the information only as necessary in the conduct of that person's official duties subject to any limitations on the unauthorized disclosure of such information. Any state, state subdivision, Indian tribal, or foreign government official who receives information under Rule 6(e)(3)(D) may use the information only in a manner consistent with any guidelines issued by the Attorney General and the Director of National Intelligence.

(ii) Within a reasonable time after disclosure is made under Rule 6(e)(3)(D), an attorney for the government must file, under seal, a notice with the court in the district where the grand jury convened stating that such information was disclosed and the departments, agencies, or entities to which the disclosure was made.

(iii) As used in Rule 6(e)(3)(D), the term "foreign intelligence information" means:

(a) information, whether or not it concerns a United States person, that relates to the ability of the United States to protect against--

. actual or potential attack or other grave hostile acts of a foreign power or its agent;

. sabotage or international terrorism by a foreign power or its agent; or

. clandestine intelligence activities by an intelligence service or network of a foreign power or by its agent; or

(b) information, whether or not it concerns a United States person, with respect to a foreign power or foreign territory that relates to--

. the national defense or the security of the United States; or the conduct of the foreign affairs of the United States.

(E) The court may authorize disclosure--at a time, in a manner, and subject to any other conditions that it directs--of a grand-jury matter:

(i) preliminarily to or in connection with a judicial proceeding;

(ii) at the request of a defendant who shows that a ground may exist to dismiss the indictment because of a matter that occurred before the grand jury;

(iii) at the request of the government, when sought by a foreign court or prosecutor for use in an official criminal investigation;

(iv) at the request of the government if it shows that the matter may disclose a violation of State, Indian tribal, or foreign criminal law, as long as the disclosure is to an appropriate state, state subdivision, Indian tribal, or foreign government official for the purpose of enforcing that law; or

(v) at the request of the government if it shows that the matter may disclose a violation of military criminal law under the Uniform Code of Military Justice, as long as the disclosure is to an appropriate military official for the purpose of enforcing that law.

(F) A petition to disclose a grand-jury matter under Rule 6(e)(3)(E)(i) must be filed in the district where the grand jury convened. Unless the hearing is ex parte--as it may be when the government is the petitioner--the petitioner must serve the petition on, and the court must afford a reasonable opportunity to appear and be heard to:

(i) an attorney for the government;

(ii) the parties to the judicial proceeding; and

(iii) any other person whom the court may designate.

(G) If the petition to disclose arises out of a judicial proceeding in another district, the petitioned court must transfer the petition to the other court unless the petitioned court can reasonably determine whether disclosure is proper. If the petitioned court decides to transfer, it must send to the transferee court the material sought to be disclosed, if feasible,

and a written evaluation of the need for continued grand jury secrecy. The transferee court must afford those persons identified in Rule 6(e)(3)(F) a reasonable opportunity to appear and be heard.

(4) Sealed Indictment. The magistrate judge to whom an indictment is returned may direct that the indictment be kept secret until the defendant is in custody or has been released pending trial. The clerk must then seal the indictment, and no person may disclose the indictment's existence except as necessary to issue or execute a warrant or summons.

(5) Closed Hearing. Subject to any right to an open hearing in a contempt proceeding, the court must close any hearing to the extent necessary to prevent disclosure of a matter occurring before a grand jury.

(6) Sealed Records. Records, orders, and subpoenas relating to grand-jury proceedings must be kept under seal to the extent and as long as necessary to prevent the unauthorized disclosure of a matter occurring before a grand jury.

(7) Contempt. A knowing violation of Rule 6, or of any guidelines jointly issued by the Attorney General and the Director of National Intelligence under Rule 6, may be punished as a contempt of court.

(f) Indictment and Return. A grand jury may indict only if at least 12 jurors concur. The grand jury--or its foreperson or deputy foreperson--must return the indictment to a magistrate judge in open court. If a complaint or information is pending against the defendant and 12 jurors do not concur in the indictment, the foreperson must promptly and in writing report the lack of concurrence to the magistrate judge.

(g) Discharging the Grand Jury. A grand jury must serve until the court discharges it, but it may serve more than 18 months only if the court, having determined that an extension is in the public interest, extends the grand jury's service. An extension may be granted for no more than 6 months, except as otherwise provided by statute.

(h) Excusing a Juror. At any time, for good cause, the court may excuse a juror either temporarily or permanently, and if permanently, the court may impanel an alternate juror in place of the excused juror.

(i) "Indian Tribe" Defined. "Indian tribe" means an Indian tribe recognized by the Secretary of the Interior on a list published in the Federal Register under 25 U.S.C. § 479a-1.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

August Term, 2006
(Argued: September 19, 2006
Docket No. **04-5763**-cr
Decided: September 27, 2006)

UNITED STATES OF AMERICA,
Appellee,
– v. –
FEDERICO GIOVANELLI,
Defendant-Appellant.

Before: CALABRESI, POOLER, and B.D.PARKER,
Circuit Judges.

Appeal from a judgment of conviction and sentence in the United States District Court for the Southern District of New York for conspiracy to obstruct justice, under 18 U.S.C. § 371, and obstruction of justice in violation of 18 U.S.C. § 1503. Affirmed.

John M. Hillebrecht, Assistant United States Attorney, for Michael J. Garcia, United States Attorney for the District of New York (Celeste L. Koeleveld, *of counsel*), *for Appellee.*

Vivian Shevitz (Jane Simkin Smith, *of counsel*), South Salem, N.Y., *for Defendant-Appellant.*

PER CURIAM:

This case requires us, inter alia, to resolve a question on which a panel of this Court has yet to speak, namely, whether United States Sentencing Guidelines (" U.S.S.G.") § 2J1.2 should apply to a conviction for obstruction of justice under 18 U.S.C. § 1503 where the conviction is based, not on actual obstruction, but rather on an "endeavoring" theory. That is, should U.S.S.G. § 2J1.2 — which applies when "the offense involved obstructing the investigation or prosecution of a criminal offense" — apply where a defendant is convicted for endeavoring, unsuccessfully, to obstruct justice? For reasons stated herein, we answer in the affirmative.

DISCUSSION

In 2004, Defendant-Appellant Federico Giovanelli ("Giovanelli") was tried before a jury in the United States District Court for the Southern District of New York, with Judge Rakoff presiding. The indictment charged Giovanelli with eighteen separate counts, including one count for conspiracy under 18 U.S.C. § 371, the object of which was to obstruct justice in violation of §1503, and two counts for "endeavoring" to obstruct justice in violation of § 1503. On May 14, 2004, after an 18-day trial, the jury acquitted Giovanelli of fifteen counts, but returned a verdict of guilty for the conspiracy count and the two obstruction of justice counts. Following trial, Judge Rakoff sentenced Giovanelli to 121 months' incarceration; on a Crosby remand, see *United States v. Crosby*, 397 F.3d 103 (2d Cir. 2005), Judge Rakoff reduced the prison sentence to 90 months.

On appeal, Giovanelli challenges his conviction and sentence. In all, he raises four arguments: (1) that the obstruction of justice charges were not supported by sufficient

evidence; (2) that the jury charge was defective; (3) that the government failed to " specify charges" and thereby violated Giovanelli's due process rights (or, as the government frames the challenge, that the government "constructively amended" or "improperly varied" the charges); and (4) that the district court incorrectly calculated the Guidelines range applicable to Giovanelli's conviction, and that Giovanelli's 90-month prison sentence is otherwise unreasonable. We consider each of these arguments in turn.

I. Sufficiency of the Trial Evidence

A defendant challenging the sufficiency of trial evidence "bears a heavy burden," *United States v. Jackson*, 335 F.3d 170, 180 (2d Cir. 2003), and the reviewing court must "view the evidence presented in the light most favorable to the government, and . . . draw all reasonable inferences in its favor," *United States v. Autuori*, 212 F.3d 105, 114 (2d Cir. 2000). Accordingly, we will affirm the jury verdict unless "no rational trier of fact could have found all of the elements of the crime beyond a reasonable doubt." *United States v. Schwarz*, 283 F.3d 76, 105 (2d Cir. 2002).

In this case, Giovanelli was convicted pursuant to the "omnibus clause" of 18 U.S.C. § 1503, which states:

> Whoever . . . corruptly or by threats or force, or by any threatening letter or communication, influences, obstructs, or impedes, or endeavors to influence, obstruct, or impede, the due administration of justice, shall be fined not more than $5, 000 or imprisoned not more than five years, or both.

The omnibus clause "makes criminal not just success in corruptly influencing the due administration of justice, but also the 'endeavor' to do so." *United States v. Aguilar*, 515 U.S. 593, 610 (1995) (Scalia, J., dissenting).

Although § 1503's "endeavor" language is potentially sweeping in its breadth, the Supreme Court in Aguilar recognized the need to "place metes and bounds on the very broad language of the catchall provision." Id. at 599. To convict under an " endeavoring" theory, the prosecution must show that "the endeavor [had] the natural and probable effect of interfering with the due administration of justice"; but "if the defendant lacks knowledge that his actions are likely to affect the judicial proceeding, he lacks the requisite intent to obstruct." Id.; *see also Schwarz*, 283 F.3d 76 (overturning a §1503 conviction for insufficiency of evidence in light of *Aguilar*). As the Aguilar Court explained, "[o]ur reading of the statute gives the term 'endeavor'a useful function to fulfill: It makes conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely to obstruct justice, but is foiled in some way." Aguilar, 515 U.S. at 601-02; see also Schwarz, 283 F.3d at 109 ("The thrust of [*Aguilar*] is that §1503 requires a specific intent to obstruct a federal . . . grand jury proceeding. Accordingly, the conduct offered to evince that intent must be conduct that is directed at the . . . grand jury and that, in the defendant's mind, has the 'natural and probable effect' of obstructing or interfering with that entity.").

Giovanelli relies on these interpretations of § 1503 to argue that his convictions cannot stand. First, he cites *Aguilar* and contends that the government failed to establish a sufficient "nexus" between his actions and the grand jury proceedings. Second, Giovanelli argues that, if the government failed to establish that he had an intent to violate § 1503, then the conspiracy charge must also be overturned.

The first of Giovanelli's contentions is meritless, and therefore both of his arguments must fail. The trial evidence, read in the light most favorable to the government, provides ample support for the following facts: (1) that Giovanelli was a long-time " Caporegime" or captain of the Genovese Organized

Crime Family of La Cosa Nostra,[1] and that he was part of the Ruling Panel running the Family at the time of his allegedly obstructive acts in 1999; (2) that, at that time, a grand jury in New York was conducting a thorough investigation into another family of La Cosa Nostra, the Decavalcante Family, and that this investigation was going to lead to numerous arrests and indictments; (3) that Giovanelli obtained detailed information from the grand jury proceedings; and (4) that Giovanelli provided to targets of the investigation, including Vincent Palermo, then the Acting Boss of the Decavalcante Family, sensitive information, including (a) two separate written lists of the people to be indicted; (b) the charges on which they were to be indicted; (c) the names of some extortion victims who were being investigated; (d) the fact that a confidential informant was using concealed recording devices to tape-record Palermo; (e) information about the identity of that informant; (f) the fact that the Grand Jury investigation "involved cell phones" that the government was monitoring; (g) the fact that among the charges being considered by the grand jury were murders; and (h) the date on which the forthcoming arrests were to occur.

This evidence clearly supports the charge that Giovanelli's endeavor — namely, that of passing along that information to the targets of the investigation — had " the natural and probable effect of interfering with the due administration of justice." Further, the fact that Giovanelli was a high-ranking member of the Genovese Family, and the fact that he passed the information, *inter alia*, to the Acting Boss of the Decavalcante Family, supports the view that Giovanelli knew "that his actions

---

[1] According to the Federal Bureau of Investigation, "La Cosa Nostra" — literally translated into English as "our thing" — is "a nationwide alliance of criminals, linked through both familial and conspiratorial ties[,] that is dedicated to pursuing crime and protecting its members." Federal Bureau of Investigation, Investigative Programs: Organized Crime, http://www.fbi.gov/hq/cid/orgcrime/lcn/lcn.htm.

[were] likely to affect the judicial proceeding." *Aguilar*, 515 U.S. at 599. The evidence also indicates that Giovanelli purloined information from the grand jury, or at least knew that it had been unlawfully obtained. *Cf. United States v. Rosner*, 485 F.2d 1213, 1228 (2d Cir. 1973). Though not itself an element of the specific § 1503 offense charged, this evidence adds support to the conclusion that he acted with the requisite knowledge and corrupt purpose to violate § 1503. Because Giovanelli then provided that information directly to the targets of the grand jury's investigation, his attempt to analogize his case to those of *Aguilar* and *Schwarz* — cases in which a defendant lied to a government investigator with no obvious connection to a particular grand jury proceeding — is unconvincing.

II. The Jury Charge

Giovanelli's second contention on appeal is that, even if the evidence was sufficient to support the jury verdict, his convictions should nevertheless be overturned because Judge Rakoff's jury charge was defective. To support this argument, Giovanelli points to the fact that Judge Rakoff's charge failed to include the "natural and probable" language of *Aguilar* — even though, as Giovanelli concedes, Judge Rakoff did require the jury to find that Giovanelli had "the specific motive or purpose of obstructing or impeding the grand jury's proceedings" in order to convict.

Under Rule 30(d) of the Federal Rules of Criminal Procedure, a party who has an objection to the charge given by the trial court "must inform the court of the specific objection and the grounds for the objection before the jury retires to deliberate." FED. R. CRIM. PROC. 30(d). And a party does not satisfy this burden merely by submitting its own proposed language as part of a requested charge. *See, e.g., United States v. Crowley*, 318 F.3d 401, 411 (2d Cir. 2003) ("[A] request for an instruction before the jury retires does not preserve an

objection to the instruction actually given by the court.") (internal quotation marks omitted). Further, if a party "invited the charge or affirmatively waived his position," she has waived any right to appellate review of the charge. *Id.* at 414.

Giovanelli has waived his challenge to Judge Rakoff's jury charge. It was at Giovanelli's request — and with his approval — that Judge Rakoff omitted the "natural and probable" language from the jury charge. Both the government's proposed jury charge, and Judge Rakoff's draft jury charge, included the "natural and probable effect" phrase; only Giovanelli objected to the language. And when Judge Rakoff, responding to Giovanelli's objection, presented the parties with a revised draft jury charge that no longer included the " natural and probable effect" language, Giovanelli's counsel acknowledged that she was "happy about [that particular omission]." Thus, there was "approval or invitation" of the omission (indeed, both), *Crowley*, 318 F.3d at 411.

III. The Indictment and Trial Presentation

Giovanelli's third argument is that "the [prosecution's] failure to specify charges violated Mr. Giovanelli's due process rights, and the 'roving' nature of the charges made it impossible to fairly defend." Giovanelli also suggests that the government's indictment and "fluid" presentation at trial violated "vagueness principles," because "it forbids no specific or definite act and leaves open . . . the widest conceivable inquiry, the scope of which no one can foresee and the result of which no one can foreshadow or adequately guard against." *United States v. Powell*, 423 U.S. 87, 92 (1975).

The government, in contrast, understands Giovanelli to be making the following two arguments: (1) that the government's shifting presentation at trial amounted to a "constructive amendment" of the indictment which "so modif[ied] essential elements of the offense charged that there is a substantial likelihood that the defendant may have been convicted of an

offense other than that charged in the indictment," *United States v. Wallace*, 59 F.3d 333, 337 (2d Cir.1995); and (2) that the government improperly varied the charges, meaning that "the charging terms are unaltered, but evidence offered at trial proves facts materially different from those alleged in the indictment," *United States v. Helmsley*, 941 F.2d 71, 89 (2d Cir. 1991).

Whether we view Giovanelli's claim more generally as one of due process and vagueness, or more particularly as one of constructive amendment and variance, the clam is unpersuasive. By May 2, 2003, nearly a full year before trial on April 19, 2004, the government gave Giovanelli's counsel all of its debriefing reports, including reports from every one of the government's cooperating witnesses. And by September 2003, defense counsel had obtained and reviewed the trial testimony of the same witnesses. Additionally, the government's indictment was broad and clearly covered all of the particulars that were later presented at trial. Moreover, in a letter to Judge Rakoff and defense counsel filed on December 19, 2003, four months before the commencement of trial, the government spelled out exactly what it expected to prove at trial. Given the appropriately broad language of the indictment, and the detailed specification of the Government's theory and evidence long before trial, Giovanelli's claim that the Government shifted theories or deprived him of fair notice has no merit.

IV. Giovanelli's Sentence

Giovanelli's final argument is that the district court improperly calculated the Guidelines range, and that the sentence is otherwise unreasonable. For the reasons that follow, we find Giovanelli's argument meritless, and affirm the district court.

A. Background

In the Presentencing Investigation Report, the Probation Office applied to Giovanelli's offenses U.S.S.G. § 2J1.2, which

in turn cross-references to § 2X3.1, the accessory-after-the-fact guideline. Under the Guidelines, whoever obstructs an investigation into a crime is treated as an accessory after the fact to that crime (in the instant case, homicide). Specifically, § 2X3.1 provides that such a cross-reference is required whenever "the offense involved obstructing the investigation or prosecution of a criminal offense." The government's proof showed that Giovanelli knew Palermo and others were being investigated for murder. His base offense level as an accessory, pursuant to § 2X3.1(a), was six levels lower than the offense level for the underlying offense (homicide), with a cap at level 30. Since the base offense level for homicide is level 43, see U.S.S.G § 2A1.1, Giovanelli's base offense level was capped at 30. Combined with Giovanelli's criminal history category of III, his Guidelines range was 121 to 151 months.

At sentencing, Giovanelli argued that "the law can't criminalize merely passing along information" and reiterated that he "contest[ed] the [prosecution's] theory as we have all along." The government responded by asserting that "Mr. Giovanelli didn't just happen upon this information lying around somewhere. He intentionally targeted the [g]rand [j]ury," and obtained the information "by communicating in some fashion with the person who had access to the secret [g]rand [j]ury investigation." Judge Rakoff ultimately rejected Giovanelli's arguments. In so doing, Rakoff noted that "this is a case of a member of a vicious criminal organization invading knowingly the secret provinces of the grand jury and the prosecutor, for the purpose of passing it on so that obstruction and retaliation could be accomplished . . . . [T] hat is my view of the facts." After imposing a sentence of 121 months, Judge Rakoff also suggested an " alternative sentence," stating for the record that, if the Guidelines did not govern, Giovanelli would have been sentenced to 96 months instead. Judge Rakoff then meticulously explained how he had arrived at that alternative sentence.

On a Crosby remand, Judge Rakoff applied the same

Guidelines range he had done originally, and then "look[ed] at all the other factors set forth in section 3553(a)." During this resentencing proceeding, Giovanelli repeated the argument that there was insufficient "evidence that he really targeted the grand jury . . . ." Judge Rakoff responded:

> [Y]ou are stuck with the fact that the government in the court's view did present very substantial evidence that Mr. Giovanelli intentionally obstructed justice and was intending to do so in connection with what he knew was a murder investigation, etc., etc. I understand your eloquent arguments as to why you think I should find otherwise, but the government has convinced me again, as they did before, that what they claim the defendant did and intended is precisely what he did and intended. They have also convinced me, as they did before, of the role in organized crime that was the backdrop, if you will, to this activity . . . . But on the basic facts I think the government has it exactly right, and I think that, frankly, as I have now gone back and reviewed it — I don't think that the standard matters in this post-Booker world but for what it's worth, I would make those findings beyond a reasonable doubt. As I reviewed all this, voluminous though it be, I was more and more persuaded of the government's factual position. . . . I do make the findings beyond a reasonable doubt.

In the end, although Judge Rakoff considered all of the § 3553(a) factors and viewed Giovanelli's offense as one that "cuts at the very heart of any legal system," he nevertheless decided to cut Giovanelli's sentence down to 90 months imprisonment.

B. The arguments on appeal

On appeal, Giovanelli makes two separate challenges to his sentence: (1) that the district court incorrectly calculated the Guidelines range because the cross- reference to the accessory-after-the-fact Guidelines should not apply, since Giovanelli endeavored to obstruct justice but was not proven to have actually obstructed justice; and (2) the sentence was otherwise unreasonable given, according to Giovanelli, the frailty of the trial evidence, the innocence of Giovanelli's conduct (i.e., merely passing information) and the fact that Judge Rakoff's real reason for imposing such a long sentence was Giovanelli's "status" as a high-ranking member of the mafia.

The government responds by arguing, first, that the cross-reference to the accessory-after-the-fact Guidelines do properly apply to "endeavors" to obstruct justice, as all four of the Circuits to rule on this issue have held. *See United States v. Flemi*, 402 F.3d 79, 97 (1st Cir. 2005) ("For an individual to qualify for the section 2J1.2(c) enhancement, it is not necessary that he succeed in obstructing justice — he may simply endeavor to do so."); *United States v. Roche*, 321 F.3d 607 (6th Cir. 2003); *United States v. Brenson*, 104 F.3d 1267, 1284 (11th Cir. 1997); *United States v. Aragon*, 983 F.2d 1306, 1315 (4th Cir. 1993). Second, the government argues that, if we agree that the district court properly calculated the Guidelines range, then the Court of Appeals has no jurisdiction, under 18 U.S.C. § 3782(a) and (b) to review the sentence for reasonableness. Alternatively, the government says that, even if the sentence is subject to reasonableness review, it is in fact reasonable.

C. Discussion

1. *The cross-reference to § 2X3.1*

U.S.S.G. § 2J1.2 applies, and requires a cross-reference to § 2X3.1, whenever "the offense involved obstructing the

investigation or prosecution of a criminal offense." The issue we must address is whether the language "involved obstructing" can be interpreted to include an "endeavor" to obstruct justice. Stated differently, did Giovanelli's offense — endeavoring to obstruct justice — "involve[] obstructing"?

We conclude that § 2J1.1 is indeed "meant to guide sentencing for all violations of 18 U.S.C. § 1503, whether on an obstruction or 'endeavoring' theory." Aragon, 983 F.2d at 1316. In doing so, we join our four sister Circuits that have considered the issue, and substantially concur in their reasoning. First, since § 2J1.2 "is the only section of the guidelines which covers 18 U.S.C.A. § 1503 (obstruction of justice)," it therefore "follows logically that endeavoring to obstruct justice, a subpart of 18 U.S.C.A. § 1503, is to be included within § 2J1.2." Id. at 1315. Second, this conclusion is "reinforced by the background commentary provided in U.S.S.G. §2J1.2," id. at 1316, which explains that:

> [b]ecause the conduct covered by this guideline is frequently part of an effort . . . to assist another person to escape punishment for an offense, a cross reference to § 2X3.1 (Accessory After the Fact) is provided. Use of this cross reference will provide an enhanced offense level when the obstruction is in respect to a particularly serious offense, whether such offense was committed by the defendant or another person. (Emphasis added).

Id. And "[a]s the underscored word 'effort' indicates, [§ 2J1.2] is meant to guide sentencing for all violations of 18 U.S.C.A. § 1503, whether on an obstruction or 'endeavoring' theory." *Id.* Third, in reaching our conclusion, we are comforted by the fact that the Supreme Court has narrowed the potentially sweeping breadth of § 1503's "endeavoring" language, so that it does no more than "make[] conduct punishable where the defendant acts with an intent to obstruct justice, and in a manner that is likely

to obstruct justice, but is foiled in some way." *Aguilar*, 515 U.S. at 601-02.

2. Reasonableness with the range

The Second Circuit has already made clear that Courts of Appeal have jurisdiction to review the reasonableness of a sentence within a properly calculated Guidelines range. *See United States v. Fernandez*, 443 F.3d 19 (2d Cir. 2006) (holding that, in light of language in the Supreme Court's *Booker* decision, the Court of Appeals does have jurisdiction to review the reasonableness of a below-Guidelines sentence); see also United States v. Kane, 452 F.3d 140, 143-44 (2d Cir. 2006) (per curiam) ("Kane next contends that his sentence is unreasonable. The government urges that we lack jurisdiction to consider the reasonableness of Kane's sentence . . . . We recently rejected the government's jurisdictional argument in *United States v. Fernandez*, 443 F.3d 19, 25-26 (2d Cir. 2006). Undeterred, the government contends that *Fernandez* is inconsistent with an earlier decision of this Court, *United States v. Colon*, 884 F.2d 1550 (2d Cir.1989), and entreats this panel to abide by *Colon*. We cannot do so.").

Accordingly, we exercise jurisdiction and conclude that the sentence is in fact reasonable. In *Crosby*, 397 F.3d 103, we articulated two dimensions of post-Booker reasonableness review. First, we must review sentences for their substantive reasonableness, that is, whether the sentence length is reasonable in light of the applicable Guidelines range and other factors set out in 18 U.S.C. § 3553(a). *Crosby*, 397 F.3d at 114. Second, we review procedural reasonableness — essentially, whether the sentencing court complied with Booker (1) by treating the Guidelines as advisory only; (2) by actually considering the applicable Guidelines range (or ranges); and (3) by considering the other factors listed in § 3553(a). Id. at 115. Under the *Crosby* standard, Judge Rakoff's sentence is clearly reasonable, both substantively and procedurally. He carefully

explained the bases for his determination in two proceedings, and during resentencing he reduced the original 121-month sentence to 90 months' imprisonment — even though, in the first proceeding, he had suggested that the sentence would be 96 months if the Guidelines were determined to be non-mandatory. Giovanelli's arguments — that the sentence is unreasonable because he is 73-years-old and in poor health, because the witnesses at trial were unreliable, and because Judge Rakoff expressed bias toward him due to his membership in the Mafia — all fail.

CONCLUSION

We have considered all of the Defendant-Appellant's arguments on appeal and find them to be without merit. The judgment of conviction entered against the Defendant-Appellant, and the sentence of 90 months' imprisonment, are therefore AFFIRMED.

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Docket Number: 04-5763-cr
Short Title: USA v. Giovannelli
DC Docket Number: 01-cr-749
DC: SDNY (NEW YORK CITY)
DC Judge: Honorable Jed Rakoff

At a stated term of the United States Court of Appeals for the Second Circuit. held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street. in the City of New York, on the 28th day of March two thousand seven.

USA v. Giovanelli

A petition for panel rehearing and a petition for rehearing *en banc* having been filed herein by the Appellant FEDERICO GIOVANELLI. Upon consideration by the panel that decided the appeal, it is Ordered that said petition for rehearing is **DENIED.**

It is further noted that the petition for rehearing en banc has been transmitted to the judges for the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

For the Court,
Thomas Asreen. Acting Clerk

/s/
Motion Staff Attorney

APPENDIX D

CHARGE

obstructing justice himself, the government must prove beyond a reasonable doubt each of three elements: first, that in and around October and November 1999, a federal grand jury in the Southern District of New York was conducting an inquiry into organized crime; second, that Mr. Giovanelli knew, directly or circumstantially, that the grand jury was conducting such an inquiry and was preparing to issue charges; and third, that Mr. Giovanelli knowingly and corruptly endeavored to obstruct or impede the grand jury proceedings by actions he took at an alleged meeting with Anthony Rotondo in or about October 1999, that is Count 4, and/or at an alleged meeting with Vincent Palermo on or about November 29, 1999, and that is Count 5. In this connection "corruptly endeavored" means to undertake some activity with the specific motive or purpose of obstructing or impeding the grand jury's proceedings in some respect. Such a purpose includes any intent to interfere with any aspect of the grand jury's work and the proceedings related thereto, even if the endeavor is unsuccessful. Specifically, the government here alleges that at each of the meetings that are the focus of Counts 4 and 5, respectively, defendant Giovanelli, for the purpose of interfering with the grand jury's investigation and related proceedings, passed on to potential targets of the grand jury's investigation information that he knew had been unlawfully obtained regarding the targets and subject matter of that investigation, knowing that such disclosure might help the targets to hide assets, avoid arrest, tamper with witnesses, or otherwise interfere with the grand jury's proceedings.

If as to any given count the government proves each of the foregoing elements beyond a reasonable doubt, then you must convict Mr. Giovanelli on that count. Alternatively, however, Mr. Giovanelli is also guilty of such a count if he aided and abetted someone else to obstruct justice in the manner described in that count. Under this approach, a defendant is

guilty as an aider and abettor if the government proves beyond a reasonable doubt, first, that someone else committed all the elements of the underlying crime in issue, here, obstruction of justice as described in Counts 4 and/or Count 5, and second, that the defendant, knowing that such a crime was being committed, purposely associated himself with that criminal venture and intentionally took actions to help it succeed.

THE COURT: Please note however that the law does not recognize or permit guilt by association and that, therefore, the mere presence of the defendant where a crime is being committed, even when coupled with knowledge by the defendant that the crime is being committed is not sufficient to make the defendant guilty of that crime as an aider or abettor. The defendant is guilty as an aider or abettor, only in addition to knowing the crime is being committed by someone else, the defendant takes actions intended to make in crime succeed. As to the given count you are considering, whether Count 4 relating to the October meeting with Mr. Rotondo, or Count 5 relating to the November meeting with Mr. Palermo, if the government has proven beyond a reasonable doubt either that Mr. Giovanelli committed obstruction of justice or that he aided and abetted another to do so, you must convict him of that count. Otherwise, you must acquit him of that count. In addition to the two substantive counts of obstruction of justice, Mr. Giovanelli is also charged in Count 3 with conspiring to obstruct justice. In order for a defendant to be guilty of any conspiracy charge, the government must prove beyond a reasonable doubt each of the three elements.

First, that two or more persons entered into an unlawful agreement.

Second, that the defendant knowingly and willfully joined in the conspiratorial agreement and thereby became a member of the conspiracy.

And third, that at least one overt act in furtherance of the conspiracy was knowingly committed by at least one member of the conspiracy.

As to the first element, conspiracy is an agreement or an understanding between two or more persons to carry out one or more unlawful objectives. To show conspiratorial agreement, the government is not required to show that two or more people entered into a solemn pact or had anything in writing stating that they had formed the conspiracy or spelling out the details. Rather, the government is required to prove only that two or more persons explicitly or implicitly came to an understanding to accomplish an unlawful objective. Here, the unlawful agreement alleged in Count 3 is an agreement to obstruct the grand jury proceedings previously referred to, at some point in time between October of 1999 and July of 2000.

As to the second element that the defendant knowingly and willfully joined the conspiracy to act knowingly means to act consciously or deliberately rather than mistaken or inadvertently and to act willfully means to act purposely and with knowledge and intent to do something unlawful. Thus, a defendant enters into a conspiracy knowingly and willfully if he joins the conspiracy deliberately, purposefully, and with knowledge of and intent to further one or more of the conspiracy's unlawful objectives. It is not necessary that the defendant had been fully informed of all the details of the alleged conspiracy in order to justify an inference of membership on his part, nor does the defendant need to have known the full extent of the alleged conspiracy or all of its participants. Indeed it is not necessary that the defendant know more than one other member of the alleged conspiracy. It is also not necessary that the alleged conspiracy actually succeeded. Finally, it is not necessary that the defendant join in all the unlawful objectives of the conspiracy. Joining in even just one objective is sufficient as long as you are unanimous on the objective that the defendant joined.

However, mere association by the defendant with a co-conspirator does not make the defendant a member of the conspiracy, even if the defendant knows that a conspiracy is being attempted, unless the defendant intentionally agrees to

participate in the conspiracy himself. In other words, Mr. Giovanelli cannot be held to have joined any conspiracy to obstruct the grand jury proceedings unless you find that he intentionally agreed to do so.

Finally, as to the third element that at least one overt act in furtherance of the conspiracy was knowingly committed by at least one conspirator. An overt act is any step, action, or conduct intended to accomplish or further one